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COMMENTS ON REMAND
ON BEHALF OF INTERESTED PERSON
CALIFORNIA SCHOOL BOARDS ASSOCIATION

California School Boards Assoc. v. State of California (2009)
171 Cal.Ap.4th 1183;
Sacramento County Superior Court, Case No. 06 CS 01335

Chapter 890, Statutes of 2004
Government Code Sections 17553, 17557, 17564
And California Code of Regulations, title 2, Sections 1183 and 1183.13

Claim No. CSM-05-TC-05

Mandate Reimbursement Process II

California School Boards Association ("CSBA") submits the following comments in response to the Notice of Remanded Test Claim and Schedule for Comments issued by the Commission in this proceeding on July 2, 2009.

The test claim seeks reimbursement for activities related to compliance with Statutes 2004, chapter 890, and California Code of Regulations, title 2, sections 1183 and 1183.13. In general, these activities involve expanded test filing requirements (including the submission of additional documentation), development of and participation in "reasonable reimbursement methodology" activities, and compliance with claiming instructions when filing cost claims.

This matter is before the Commission on remand with directions from the Third District Court of Appeal in *California School Boards Ass'n v. State* (2009) 171 Cal.App.4th 1183 ("*CSBA v State*"). In that case, CSBA (and others) challenged the constitutionality of Assembly Bill 138 ("AB 138"). Among other things, AB 138 expanded Government Code section 17556(f) to except from reimbursement the cost of duties that were "necessary to implement" or "reasonably within the scope of" a ballot measure. The Court ultimately found that the exception for the cost of duties "necessary to implement" a ballot measure was consistent with the constitutional requirement of article XIII B, section 6, but the exception for the cost of duties "reasonably within the scope of" a ballot measure was impermissible as overly broad.

When the Commission previously considered the MRP II test claim, it relied upon the Legislature's declaration when it adopted the statutory scheme at Government Code

17500 et seq. that its intent was "to provide for the implementation of Section 6 of article XIII B of the California Constitution." Based on this language, the Commission concluded that "the test claim statutes and executive orders, as part of that statutory scheme, meet the statutory standard of section 17556(f), in that they are 'necessary to implement' [or] 'reasonably within the scope of' article XIII B, section 6."

The Court of Appeal found that "[t]he Commission's conclusion that the Legislature's statement of intent resolved the matter was unjustified because legislative declarations concerning whether a state mandate exists are irrelevant to the Commission's determination of whether a state mandate exists." Because the Commission relied on the legislative declaration in denying the MRP II test claim, as well as the invalidated language of AB 138, the Court set aside the Commission decision and directed the Commission to reconsider the test claim.

This letter focuses on the second point raised in the Commission Notice, i.e., does Government Code 17556(f), as interpreted by the Court, preclude reimbursement? CSBA believes that it does not, as there is no reason to believe that the provisions at issue are "necessary to implement" article XIII B, section 6.

1. What Does it Mean to Be "Necessary to Implement" A Ballot Measure?

Although the Court concluded that it was constitutionally permissible for the Legislature to except from reimbursement the cost of duties that are "expressly provided" or "necessary to implement" a ballot measure, and made a few observations about the latter standard, it did not attempt to provide a comprehensive definition of that phrase.

The California Supreme Court has indicated that the concept of "necessity" "must be ascertained by reference to the context, and to the objects and purposes of the statute in which it is found. (*San Diego & Coronado Ferry Co. v. Railroad Commission of California* (1930) 210 Cal. 504, 512 [discussing "public convenience and necessity"].) CSBA believes that in the context of section 17556(f)'s exception for duties imposed by a ballot measure, "necessary to implement" reflects the dictionary definition: "inescapable," "compulsory" or "required." (Webster's Ninth New Collegiate Dictionary.) We say this based upon the nature of the exception created in section 17556(f) as well as the interpretation given to this language by the Court in *CSBA v. State*.

The exception from reimbursement set out in section 17556(f) has its origins in the actual language of article XIII B, section 6, which requires reimbursement "whenever *the Legislature* or any state agency mandates a new program or higher level of service on any local government." (Emphasis added.) In *CSBA v. State*, the Court of Appeal concluded that the reference to "the Legislature" meant that duties imposed by the voters that were "expressly included in" a ballot measure were not subject to reimbursement. (*CSBA v. State* at 1205-1210.) However, duties imposed that are assertedly "necessary to implement" or "reasonably within the scope of" a ballot measure are undeniably acts of the Legislature and, therefore, on their face, subject to reimbursement under article XIII

B, section 6. Indeed, prior to the enactment of Assembly Bill 138, any legislative acts that were not expressly included in a ballot measure required reimbursement.

As the Court noted in *CSBA v. State*, the phrase "expressly included in" has the narrowest scope, "reasonably within the scope of" has the broadest, and "necessary to implement" lies somewhere in between. (*Id.* at 1211.) As the Court further noted, in order for section 17556(f) to be consistent with article XIII B, section 6, it has to be interpreted to deny reimbursement *only* to the extent that costs imposed by a statute are necessary to implement the ballot measure, which the Court indicated is "*much more limited* than" "reasonably within the scope of." (*Id.* at 1215.)

The Court also noted that, although section 17556(c) makes duties "*adopted* to implement" federal law nonreimbursable, the addition of the word "necessary" in section 17556(f) means that "*necessary* to implement" is "*even more restrictive*" than "adopted to implement." (*Id.* at 1214 [emphasis added].) It therefore appears that the phrase "necessary to implement" must be construed narrowly to apply only to legal requirements that are so clear from the language of the ballot measure that they can reasonably be said to be the act of the voters rather than the act of the Legislature, i.e., those requirements must be the legal and practical equivalent of duties "expressly included in" the ballot measure. (See also the Court's language at 1213 that this language "corresponds to" holding in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 that duties are not reimbursable if they are "part and parcel" of the federal mandate.) If the required acts reflect Legislative discretion or preference rather than being "inescapable," "compulsory" or "required" by the language of the ballot measure, they may be "adopted to implement" that measure, but are not "necessary" to implement that measure. As a consequence, any new program or higher level of service required by the Legislature that does not meet this standard is properly attributable to "the Legislature" rather than the voters and must be reimbursed under article XIII B, section 6.

In addition to the Court's specific statements in *CSBA v. State*, it has long been established that any regulation of a constitutional right "must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it." (*Chesney v. Byram* (1940) 15 Cal.2d 460, 464 [citations omitted]; see also *Engelmann v. State Bd. of Education* (1991) 2 Cal.App.4th 47, 55 ["It is well established the Legislature may define, limit, or condition a constitutional power or right so long as it does not unduly burden the exercise of that power or right."].) Anything other than a narrow interpretation of "necessary to implement" would expand section 17556(f) to except from reimbursement not only acts of the voters, but acts of the Legislature, an impermissible impairment or limitation on the right of reimbursement for acts of the Legislature.

In the context of MRP II, it is apparent that the requirements at issue cannot be considered "necessary to implement" article XIII B, section 6, as that provision has been implemented for almost 30 years without the need for such requirements. That fact alone demonstrates that the provisions at issue were not necessary to put the legislative scheme into effect. In addition, the duties related to the "Reasonable Reimbursement Methodology" have no actual basis in the language of article XIII B, section 6, but have

been devised in an effort to create an alternative to the current time-consuming, expensive process which essentially offers local government an opportunity to accept less-than-full reimbursement in exchange for more prompt payment.

2. Who Has the Burden of Proving that Duties are "Necessary to Implement" A Ballot Measure?

The burden of producing sufficient evidence in the record as to whether the duties at issue are "necessary to implement" a ballot measure cannot be placed on the claimant, but should be placed on any person or entity challenging the test claim.[1] This is because the claimant is not claiming that the particular duties at issue are "necessary to implement" a ballot measure, and a litigant typically only has the burden of proving that which he or she affirmatively asserts.

Evidence Code section 500 states the baseline rule regarding the allocation of the burden of proof: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." The party claiming an exemption from a general statute has the burden of proving that he comes within the exemption. (*Norwood v. Judd* (1949) 93 Cal.App.2d 276, 282.)

The Law Revision Commission Comments to section 500 state that a party normally has the burden of proving those facts that he must affirmatively plead. For example, the courts have stated that a party must only plead the non-applicability of an exception to a general rule if the exception is in the same section as the enacting clause. If the exception is in a different section, a party does not have to negative the exception in a pleading. (*G.H.I.I. v. MTS, Inc.*, (1983) 147 Cal. App.3d 256, 273.)

Although the burden of proving that a particular duty has been imposed by "the Legislature" may be part of the claimant's initial burden under article XIII B, section 6, once the claimant demonstrates that the duty has been imposed by the Legislature, that burden is satisfied. If the duty is "expressly included in" a ballot measure, a claimant will not be able to satisfy the threshold burden; however, if the Legislature chooses to define certain *legislatively imposed* duties as nonreimbursable, as it has done with section 17556(f), then the burden shifts to the entity asserting that such duties are "necessary to implement" a ballot measure to support that assertion with substantial evidence. Nothing in the Government Code provisions implementing article XIII B, section 6, or in the Commission forms and regulations, require information about the relationship of the test claim to potential ballot measures. In short, nothing in the Constitution, existing statutes or rules suggest that the claimant does or should have the burden of asserting, or proving,

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[1] Similarly, if a person wishes to assert that costs should not be allowed pursuant to any of the provisions of section 17556(a)-(g), that person bears the burden of providing evidence as to the applicability of the other statutory provisions. Or if a person wishes to assert a non-statutory claim that costs are "de minimis" in the over-all context of a particular program (see *San Diego Unified, supra*), that person should bear the burden of demonstrating the over-all program costs in relation to the test claim. The claimant's only burden is to demonstrate that that the claim exceeds $1000 – the statutory de minimis standard. (Gov. Code, § 17564.)

that particular duties are not necessary to implement a ballot measure.

3. What Showing is Necessary to Support a Finding that Duties Are "Necessary to Implement" A Ballot Measure?

The Commission can only deny reimbursement for costs under Government Code 17556(f) if it "finds" after a hearing that the claim involves duties that are necessary to implement a ballot measure. Since the Commission's decisions must be supported by substantial evidence (Government Code section 17559), any finding that the test claim duties are "necessary to implement" must be supported by evidence in the record that demonstrates *why* these duties were "necessary to implement" the ballot measure at issue. A finding that the provisions at issue were adopted to "implement" article XIII B, section 6, even if accurate, would therefore be insufficient to deny reimbursement pursuant to section 17556(f). (*CSBA v. State* at 1214.) Similarly, evidence that the duties merely "further" article XIII B, section 6, or are consistent with that provision, would not meet the "necessary to implement" requirement. Finally, an assertion that the statutory duties are the most effective or efficient from the State's perspective does not necessarily mean that they are "necessary" in the sense that they are "inescapable" or that the constitutional guarantee could not be effectuated without them.

We believe an analogous line of cases are those interpreting the state and federal constitutional provisions prohibiting impairment of contracts. Although impairment of contracts is generally prohibited, the courts have articulated an exception where the impairment is "reasonable and necessary to serve an important public purpose." In applying this standard, however,

> complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

(*United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 25.)

The impairment cases have also made clear that the government has the burden of demonstrating necessity and that mere conclusory statements to that effect are insufficient. (*Valdes v. Cory* (1983) 139 Cal.App.3d 773, 791.) In the case of article XIII B, section 6, the State's self-interest is similarly at stake and the State has every incentive to attempt to reduce its financial obligation to local government. Just as the Court of Appeal made it clear that the Commission cannot rely on the Legislature's assertion that a particular duty is "necessary to implement" a ballot measure, the Commission should be equally non-deferential – in fact, skeptical – of the State's assertion in these proceedings that certain duties are "necessary to implement" article XIII B, section 6. (See, e.g., *University of Hawaii Professional Assembly v. Cayetano* (9th Cir.1999) 183 F.3d 1096, 1107 [higher level of scrutiny appropriate].)

In summary, before the Commission can make a finding that particular duties are necessary to implement a ballot measure, including article XIII, section 6, there must be competent evidence demonstrating why those specific duties are so essential to implementation of the measure that they are the equivalent of "expressly included" duties. In the absence of such evidence, a showing that the Legislature has imposed duties upon local governments that constitute a new program or higher level of service, and that the cost of those duties exceed the statutory minimum, entitles the claimant to reimbursement under article XIII, section 6.

CERTIFICATION

I declare under penalty of perjury under the laws of the State of California that the statements made in this document are try and correct, except as to those matters stated upon information and belief and as to those matters, I believe them to be true.

Executed this 10th day of August, 2009 at Sacramento, California.

DEBORAH B. CAPLAN